



## NOTES & TRENDS

### CIVIL LITIGATION

#### JUDICIAL LAW

■ **DELIBERATE AVOIDANCE OF PERSONAL SERVICE.** The Minnesota Court of Appeals, interpreting Rule 4.03, recently held that leaving a summons and complaint inside the screen door of an individual's home, after she refused to accept the documents, *did* constitute effective personal service. The plaintiff attempted to personally serve defendant, an attorney, at her home. When the process server rang the doorbell, defendant refused to open the outer door and stated that she was not accepting any papers, then closed the door. The process server then knocked at a side door. Defendant refused to come to the door. The process server ultimately left the summons and complaint inside the screen door. Defendant argued that personal service had not been completed. The court followed the reasoning in *Nielson v. Braland*, 264 Minn. 481, 119 N.W.2d 737 (1963) whereby, when the process server and defendant are within speaking distance of each other and a reasonable person would think that service is being attempted, service cannot be avoided by refusing to physically accept the summons. The Court of Appeals extended the *Nielson* holding to apply when the process server is not successful in actually touching the person on whom service is being attempted. The court also noted that defendant need not have been aware that the process server was trying to give her a summons and complaint, only that he was trying to give her the papers he was holding. **Ochs v. Kimball**, C5-02-1766 (Minn. App. 07/08/03)(unpublished).

<http://www.lawlibrary.state.mn.us/archive/ctapun/0307/op021766-0708.htm>

■ **TEMPORARY INJUNCTION ORDERS; DAHLBERG FACTORS; FINDINGS REQUIRED.** A recent unpublished opinion presents an important pointer for those submitting proposed orders to district court in conjunction with a motion for a temporary injunction. Not surprisingly, the Minnesota Court of Appeals pointed out that a district court ordering a temporary injunction must include sufficient findings to permit meaningful appellate review of its analysis of the five *Dahlberg* factors. A simple statement that "analysis of the *Dahlberg* factors favors the issuance of a temporary injunction" is not sufficiently detailed and will thus be open to challenge. Instead, the district court must indicate not only that it analyzed the *Dahlberg* factors, but also explain which ones favor the issuance of a temporary injunction. Therefore, civil litigators submitting proposed orders in connection with motions for temporary injunction would be well-advised to list findings for each *Dahlberg* factor, as well as proposed language indicating which factors favor issuance of a temporary injunction, when drafting their proposed orders. See **High Forest Township v. Malcolm, Inc.**, C3-03-58 (Minn. App. 07/01/03) (unpublished). <http://www.lawlibrary.state.mn.us/archive/ctapun/0307/op030058-0701.htm>

■ **AMENDMENT OF COMPLAINT; REAL PARTY IN INTEREST; STATUTE OF LIMITATIONS.** The Minnesota Supreme Court has held that Rule 15.03 permits amendment of a complaint to reflect the real party in interest, despite the running of the statute of limitations, when the claim or defense asserted in the amended pleading: (i) put the opposing party on notice of a valid claim; (ii) the opposing party was not unfairly prejudiced; and (iii) arose out of the same conduct, transaction, or occurrence set forth in the original pleading. In this case, the plaintiff was a conservator for a minor whose father was killed by someone intoxicated. She brought an action under the Civil Damages Act (relating to damages suits brought against sellers of alcohol when intoxicated persons injure others), naming herself as plaintiff, before the statute of limitations lapsed. Later, after the statute of limitations had lapsed, it was determined that the real party in interest was the minor and therefore he should have been the named plaintiff. The Court allowed the amendment to relate back to the date of the original complaint. Key to the Court's reasoning was the fact that the three conditions listed above were satisfied, and that the conservator had already been appointed (and was thus authorized to initiate suit on behalf of the minor) before the statute of limitations had run. Therefore, she could have properly named the minor when she initially commenced the lawsuit. Under these circumstances the amendment would be permitted to relate back to the date of the orig-

inal complaint. *Haugland v. Mapleview Lounge & Bottleshop, Inc.*, CX-01-1395 (Minn. 08/07/03). <http://www.lawlibrary.state.mn.us/archive/supct/0308/op011395-0807.htm>

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## CRIMINAL LAW

### JUDICIAL LAW

■ **JURY SELECTION; BATSON/McCOLLUM CHALLENGE; RACE-NEUTRAL EXPLANATION; REVERSAL.** The Supreme Court affirms the Court of Appeals holding that the defendant's racially neutral explanation for peremptory challenge was not pretextual for racial discrimination, and that the district court's erroneous denial of the peremptory challenge automatically entitles respondent to a new trial without a showing of prejudice.

The respondent in this case was white, and accused of assaulting an Hispanic employee. The court used the first-degree murder method of jury selection, whereby one prospective juror is drawn at a time, and peremptory challenges are made at the completion of the examination of each juror. The second prospective juror was an African American, who stated that her father worked as a police officer, and that she had participated in police officer training which she "loved." When defendant exercised peremptory challenge, he noted that his reason was a significant exposure to law enforcement, and his planned questioning of police actions in this case. The judge denied the peremptory *McCullum* challenge, stating that he thought the juror could be fair, and the reason seemed a bit "pretextual."

The Supreme Court notes that the court incorrectly used the criterion that is applicable to a challenge for cause, rather than the analysis which applies to peremptory challenge. Whether or not a client can be fair is irrelevant in examining a *Batson* challenge. *State v. Cecil John Reiners*, C7-01-1001 (Minn. 07/10/03). <http://www.lawlibrary.state.mn.us/archive/supct/0307/op011001-0710.htm>

■ **SEX OFFENDER REGISTRATION; HOMELESS OFFENDERS; IMPOSSIBILITY.** The Supreme Court holds that the residence registration requirements of Minn. Stat. §243.166, as it currently exists, do not apply to offenders who are truly homeless. The case is remanded to district court for determination as to the level of "homelessness" suffered by the appellant, and as to whether registration under his circumstances would be impossible. The Court recognizes that there are different levels of "homelessness," including those whose living location changes from night to night, as opposed to someone who is living temporarily in a friend's home for six months. Individual factual determinations must be made by the district court before a violation of the sex offender registration statute is found. *State v. Thomas Jerome Iverson*, C6-01-1930 (Minn. 07/10/03).

<http://www.lawlibrary.state.mn.us/archive/supct/0307/OP011930-0710.htm>

■ **SEARCH AND SEIZURE; SHORT-TERM GUESTS; HOTEL; DRUG TRANSACTIONS.** Police were searching for a parole violator, and entered a room, using force, without a warrant. The man present in the room was the appellant, and not the parole violator. While in the room, police observed narcotics, and arrested the appellant. No one present in the room, including the appellant, admitted that they planned to spend the night in a hotel room, which had been rented by a woman from Wisconsin for them, in her name. The woman was not present, and her whereabouts were unknown by the people present in the room. A codefendant told one of the officers that he had gone to the room to "get high." Appellant did not have the key card to the room in question.

Held, although the appellant has demonstrated an actual subjective expectation of privacy in the room, because he plainly attempted to exclude police, this expectation of privacy is not one that society is willing to protect. Because of the commercial nature of the business which appellant was apparently involved in, with respect to drugs, this case is more like *Minnesota v. Carter*, 525 U.S. 83 (1998), than *In Re B.R.K.*, 658 N.W.2d 565 (Minn. 2003) (which accorded 4th Amendment protection to a short-term social guest.) Also, this case declines to address the issue of "automatic standing," finding waiver by the appellant, but the opinion, in dictum, casts some doubt on the continued viability of this doctrine. *State v. Brandon Nathaniel Sletten*, C0-02-1500 (Minn. App. 07/03/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0307/op021500-0703.htm>

■ **APPEAL; WAIVER; EVIDENTIARY RULING; DISMISSED COUNT.** During trial, the state offered to drop a weapons charge against the appellant if he would agree to not raise on appeal any issues concerning the evidentiary admission of three ammunition magazines. The appellant agree, and was found guilty of Third Degree Driving While Impaired and Fleeing a Police Officer.

Held, in this case of first impression, when the state dismisses a criminal charge in return for the

defendant's waiver of the right to appeal an evidentiary ruling by the district court related to the dismissed charge, the waiver is effective as long as it is knowing, intelligent, and voluntary. **State v. Bryce Lee Williams**, C1-02-1229 (Minn. App. 07/11/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0307/op021229-0711.htm>

■ **FIREARMS; RECKLESS DISCHARGE; JURY INSTRUCTION; STRICKEN LIABILITY; CIRCUMSTANCE AND KNOWLEDGE.** It was error in this case for the judge to instruct the jury in a hunting accident where the instructions did not take into account the totality of the circumstances at the moment the trigger was pulled, including what the defendant knew or did not know. The jury instructions included as elements (1) intentional discharge of a firearm, (2) under circumstances that endanger the safety of victim; the defendant's knowledge of the endangerment is not required to be proven by the state, and (3) that it happened on a certain date in Fillmore County. These instructions impermissibly invited the jury to disregard the facts which the appellant knew or did not know when he discharged the firearm. The jury instructions essentially create a strict liability offense. The factfinder in a reckless discharge of firearm case is to examine the totality of circumstances surrounding the shooting, including what a person did and did not know when the trigger was pulled. Reversal is required. **State v. Paul Anthony Kycia**, C3-02-1457 (Minn. App. 07/15/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0307/op021457-0715.htm>

■ **PROSECUTORIAL MISCONDUCT; CLOSING ARGUMENT; BURDEN SHIFTING.** In dictum, the court states that the following conduct by the prosecutor was inappropriate: stating the jury should acquit if it was "absolutely" sure appellant was innocent. This statement comes "dangerously close" to shifting the burden of proof to the appellant. Next, arguing that the county's woods must be kept safe from irresponsible hunters encouraged the jury to consider facts outside evidence when deliberating. Finally, arguing that there are only two types of defendants — the innocent and those who avoid responsibility for their acts — suggests that exercising a constitutional right to trial is a questionable action and is "highly disturbing." **State v. Kycia**, *supra*.

■ **CRIMINAL SEXUAL CONDUCT; FIRST DEGREE; PERSONAL INJURY; DRUGGED VICTIM.** The Supreme Court affirms the Court of Appeals in holding that causing a victim to involuntarily ingest a toxic amount of barbiturates, thereby causing amnesia, disorientation and grogginess, is sufficient impairment of physical condition to satisfy the definition of "personal injury" as an element of first-degree criminal sexual conduct. Here, the jury found the victim had been surreptitiously given barbiturates by the defendant, resulting in an impaired condition during which the defendant engaged in sexual penetration with the victim. **State v. Carl James Jarvis**, C2-01-1097 (Minn. 07/24/03).

<http://www.lawlibrary.state.mn.us/archive/supct/0307/OP011097-0724.htm>

■ **SENTENCE; JAIL CREDIT; LOCKED RESIDENTIAL TREATMENT; PROBATION.** Appellant pled guilty to first-degree assault, and received a 98-month state sentence, after being certified as an adult. One of the probationary conditions was that the appellant enter and complete the program of the intensive treatment center (ITC) at the Bar-None Facility in Anoka. ITC is a locked program for juveniles with severe conduct disorders. In order to enter or leave the building, one must pass through three locked doors. There are bars on the outside windows, surveillance cameras, and each resident has an individual "wet cell" that is locked at night and during a crisis.

Held, although the sentencing guidelines contemplate credit for time served only when the facility is a jail, workhouse, or regional correctional facility, the Supreme Court holds that the rule of proportionality requires that when a residential treatment center is the functional equivalent of a jail, credit must be given for probationary time served against a later executed sentence. Hence, the appellant was entitled to 288 days of "time served" for his stay in ITC. **Fithi Chernet Asfaha v. State**, C6-02-691 (Minn. 07/24/03). <http://www.lawlibrary.state.mn.us/archive/supct/0307/op020691-0724.htm>

■ **SENTENCE; DEPARTURE; REASONS; NOT ORIGINALLY STATED.** The Supreme Court resolves a conflict between two conflicting lines of cases from the Court of Appeals. One line of cases holds that the sentencing judge be given an opportunity to provide reasons for a departure, on the record, after a remand by the appellate courts. A second line of cases does not permit departures on remand, if such reasons were not originally stated by the trial court at the time of sentence. The Supreme Court reaffirms and clarifies *Williams v. State*, 361 N.W.2d 840 (Minn. 1985): "Absent a statement of the reasons for the sentencing departure placed on the record at the time of sentencing, no departure will be allowed." **State v. Jason Patrick Geller**, CX-02-970 (Minn. 07/24/03).

<http://www.lawlibrary.state.mn.us/archive/supct/0307/op020970-0724.htm>

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## EMPLOYMENT & LABOR LAW

### JUDICIAL LAW

■ **PRIVACY.** Employees of a trucking company whose Social Security numbers were divulged, without authorization, to others within the company, are not entitled to pursue a class action for breach of privacy in *Bodah v. Lakeville Motor Express, Inc.*, 2003 Minn. LEXIS 362 (Minn. 06/26/03). Reversing a ruling of the appellate court upholding a class action privacy claim the Court relied upon the Restatement (Second of Torts), which requires wide-spread distribution in order to maintain a privacy claim.

The decision came within a few days of the U.S. Supreme Court decision agreeing to hear a case during its upcoming term involving privacy rights for improper use of a Social Security number in *Doe v. Chao*, No. 02-1377. The High Court will determine whether a coal miner, whose Social Security number was wrongfully divulged by the Department of Labor, is entitled to a statutory damage award of \$1,000 under the Federal Privacy Act, without proof of actual damages. At about the same time, the General Accounting Office (GAO) issued a blistering report about widespread abuses in use of Social Security numbers.

■ **DISABILITY DISCRIMINATION.** The 8th Circuit Court of Appeals recently decided three “perception of disability” cases, all arising under the provision of the American with Disabilities Act (ADA) that prohibits employers from discriminating against an employee who is “regarded as” having a disability, whether the disability exists or not. In *Simonson v. Trinity Regional Health System*, 2003 WL 21658618 (8th Cir. 2003), the court ruled that a veteran nurse could not sue for “perception of disability” after she was not transferred back to an available position following a temporary position operating a computer due to work-related injuries. The employer was not liable because it had not “perceived her as having an impairment that significantly restricted her ability” to perform her work.

In *Schuler v. SuperValu, Inc.*, 2003 WL 21658616 (8th Cir. 2003), an appeal from a federal district court decision in Minnesota, the 8th Circuit held that an epileptic employee could not sue for “perception disability” after he was turned down for a warehouse job in the Twin Cities. An independent medical examiner imposed work restrictions on the employee, which prevented him from working at the job. The employer did not know that the employee had epilepsy. Because the medical examiner and employer were “separate and distinct entities in every relevant respect,” the medical facility’s knowledge could not be imputed to the employer. Further, the claim was not actual because the employer only determined that the job applicant was precluded from performing functions necessary to “a specific job in its warehouse,” rather than a “class of jobs or a broad range of jobs,” which is necessary to trigger an ADA claim.

But a jury verdict in favor of an asthmatic job applicant, who was turned down for work, was upheld in *Ollie v. Titan Tire Corporation*, 2003 WL 21649010 (8th Cir. 2003). The job applicant’s doctor indicated that due to his asthmatic condition, he should not work in the presence of dust or fumes in a manufacturing plant. The employer’s rejection of the employee constituted a violation of the “perception” of disability clause because he was deemed to be precluded from performing any job which would put him “in contact with dust or fumes,” rather than a single job in the plant. The employee’s claim for ten years of front pay was rejected by the court, which limited front pay to two years, because the employee was “relatively young” and had already obtained another job with equivalent salary, benefits, seniority and opportunity for advancement.

■ **SEX DISCRIMINATION.** An award of damages for front pay may be trebled under the Minnesota Human Rights Act. In *Ray v. Miller Meester Advertising, Inc.*, 664 N.W.2d 355 (Minn. App. 2003), the appellate court confirmed a lower court ruling that trebled damages for front pay for sex discrimination under the statute. The reason that the trebling provision of the Human Rights Act applies to front pay awards as well as compensation for back pay and other past damages is because, as the *Ray* court notes, front pay can be considered an “actual loss,” and therefore can be awarded as compensatory damages.

■ **FRONT PAY.** A company that took over the assets and management of a bar, which had been advised it was liable for sexual harassment, was responsible for the judgment as a successor employer in *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291 (Minn. App. 2003). The court held that the transferee of the business was liable under the doctrine of successor-employer liability, based upon a decision by the federal appellate court under the sexual discrimination provision of Title VII of the Federal Civil Rights Act, even though the documents that transferred ownership of the business did not provide that the successor would be liable for the outstanding judgment.

■ **UNEMPLOYMENT COMPENSATION.** Driving a commercial vehicle during the scope of his employment, with a blood-alcohol level in excess of .04 constitutes misconduct and disqualifies an employee for unemployment compensation benefits in *Risk v. Eastside Beverage*, 664 N.W.2d 16 (Minn. App. 2003). The appellate court ruled that the employee was ineligible for unemployment benefits because his blood alcohol level exceeded the allowable .04 maximum as a matter of law.

An employee who was denied a promised raise of 25 percent was entitled to receive unemployment compensation benefits in *Hayes v. K-Mart Corp.*, 2003 Minn. App. LEXIS 878 (Minn. App. 07/22/03). The failure to provide the promised raise constitutes “good cause” for the employee to quit and to be eligible for unemployment benefits. But an employee was disqualified from unemployment benefits and deemed to have quit without good cause in *Christianson v. Transport Leasing Contract, Inc.*, 2003 Minn. App. LEXIS 862 (Minn. App. 07/22/03) (unpublished). The employee, who was a leased truck driver, was required on account of his employment to contact the company for reassignment if he was released from his duties with the lessee. After his lease work ended, the employee did not contact his company for reassignment, even though the company informed him that positions were available and invited him to discuss possible reassignment options. The employee’s failure to seek reassignment options, as required by his contract with the employer, did not constitute “good cause” to entitle him to unemployment compensation benefits.

■ **DUTY OF FAIR REPRESENTATION.** A pair of employees failed in challenging decisions by the union not to appeal adverse arbitration awards under the Duty of Fair Representation doctrine. In *Kolosky v. AFSCME Local No. 1164*, 2003 Minn. App. LEXIS 868 (Minn. App. 07/22/03) (unpublished), an employee at Fairview University Hospital was fired for threatening behavior after losing an arbitration award. His union’s refusal to appeal the award did not constitute a breach of the duty of fair representation because the collective bargaining agreement provided that arbitration awards are final and binding.

Similarly, in *Chilefone v. Metropolitan Council*, 2003 Minn. App. LEXIS 855 (Minn. App. 07/22/03) (unpublished), an employee, who was fired after failing a drug test under questionable circumstances, could not sue his union for breach of duty of fair representation. The union representative pursued a grievance through arbitration on his behalf, and did not challenge the adverse arbitration award. The union had no further obligation to appeal the decision, and the employee could not sue the employer for wrongful termination because only the union has standing to pursue a claim against the employer under the collective bargaining agreement.

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## ENVIRONMENTAL LAW

### JUDICIAL LAW

■ **ENVIRONMENTAL REVIEW; EVIDENCE OUTSIDE THE RECORD.** The Minnesota Court of Appeals overturned a district court’s determination that a responsible government unit’s (RGU’s) negative declaration on an environmental impact statement (EIS) was justified by the record before the RGU. The RGU in this case, the city of Burnsville, had determined that a proposed outdoor amphitheater did not meet the minimum standards under the Minnesota Environmental Policy Act (MEPA) for either a mandatory or a discretionary EIS. The city of Bloomington and the Bloomington Amphitheater Coalition challenged this determination in district court, where the RGU’s decisions were upheld. The Court of Appeals later reversed that determination. It first held that MEPA contemplates that an EIS determination will be made on the basis of the Environmental Assessment Worksheet (EAW), the comments of the interested parties, and the RGU’s responses to those comments. Although admittedly not without conflict, the Court of Appeals found that the information contained within the above sources ultimately suggested that the proposed amphitheater would reach a capacity of 20,000 or more people, the minimum necessary to trigger a mandatory EIS. The Court of Appeals rejected the RGU’s efforts to introduce additional evidence in support of its decision because that additional evidence was not the type of extra-record evidence that the court deemed admissible under *White v. Minn. Dep’t of Natural Res.*, 567 N.W.2d 724 (Minn. App. 1997), *rev. denied* (Minn. 10/31/97). The matter was remanded for a mandatory EIS. *City of Bloomington v. City of Burnsville*, C6-02-1985, C3-02-2009, 2003 WL 21743699 (Minn. App. 07/29/03).

■ **ENFORCEMENT; CONSENT DECREE VIOLATION PENALTIES UPHELD.** The 7th Circuit Court of Appeals upheld over \$4 million in penalties assessed against a developer for his failure to abide by the terms of a consent decree with the Environmental Protection Agency (EPA). The developer had

failed to obtain a permit from the U.S. Army Corps of Engineers before filling in four acres of wetlands. He later entered into a consent decree with the EPA in which he agreed to restore the wetlands by specified dates or be subject to stipulated penalties. The developer failed to meet six progress milestones and the EPA moved to enforce the stipulated penalties in an amount that totaled nearly \$7 million. The developer moved to vacate the consent decree on the grounds that the Supreme Court's decision in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) had undermined the enforcement authority on which the consent decree was based. In the *Solid Waste Agency* decision, the Supreme Court struck down the Corps' Migratory Bird Rule, which prohibited filling in any water body that served as a home for migratory birds, even if that water body was not otherwise a "navigable water." He also challenged the EPA's method of penalty calculation.

The 7th Circuit rejected the developer's request to vacate the consent decree. It found first that the *Solid Waste Agency* decision had no effect on the EPA's other grounds for jurisdiction, which was the wetlands' adjacency to navigable waters. Furthermore, because the developer had entered into the consent decree voluntarily, he waived his right to challenge the EPA's authority under that decree several years later. The 7th Circuit also rejected the developer's arguments that the stipulated penalties sought by the EPA were unconscionable. In upholding the over \$4 million assessed by the district court, the Court of Appeals held that the penalty provisions of the consent decree should be applied on a per violation, not a per day, basis regarding the six missed milestones. To apply the per day approach, the court held, would have provided the developer with no incentive to finish the other five milestones once he had missed the first. *U.S. v. Rueth Development Co.* 335 F.3d 589, 2003 WL 21544741 (7th Cir. 2003).

#### AGENCY ACTION

■ **SUPERFUND; RESPONSIBILITY OF BUYER FOR VALUE INCREASE.** Buyers of contaminated sites that are the subject of Environmental Protection Agency (EPA) cleanup efforts may be responsible to the EPA for the increased fair market value of the property, according to interim guidance released by the EPA. Under this policy, if the EPA's cleanup action continues or occurs after the purchase of the site, the EPA will calculate the increase in the fair market value attributable to the cleanup action. The EPA will do this by comparing the fair market value of the site as completed with the fair market value of the site when purchased. This new policy is borne out of a January 2002 amendment to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). CERCLA's new "windfall lien" provision was designed to ensure that potential purchasers, not taxpayers, bear the expense from the EPA's efforts to improve the site's value. Information regarding the new windfall lien policy is available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf>.

■ **ENFORCEMENT; EPA SEEKS TO INCREASE MAXIMUM PENALTIES.** The Environmental Protection Agency (EPA) has proposed a 14.8 percent increase in the maximum penalties for civil violations of environmental laws to account for inflation. The EPA, like other federal agencies, must review and adjust its penalties at least once every four years pursuant to the Debt Collection Improvement Act of 1996. Adjustments are based on changes to the Department of Labor's Consumer Price Index since the last adjustment. A table of the adjusted maximum penalties was published in the July 3, 2003 Federal Register (68 Fed. Reg. 39882). A final rule on this matter is expected later this year.

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#### FEDERAL PRACTICE

##### JUDICIAL LAW

■ **FRAUDULENT JOINDER; CLARIFICATION OF 8TH CIRCUIT STANDARDS.** Plaintiff, a Missouri citizen, commenced an action in the Missouri courts against several defendants who were citizens of other states and several Missouri citizens. The non-Missouri citizens removed the action on the basis of diversity of citizenship, alleging that the Missouri defendants had been fraudulently joined. Plaintiff moved to remand, and the district court granted the motion, finding it unclear whether Missouri law would recognize the claims asserted against the non-diverse defendants, which in turn meant that the removing defendants could not meet their burden of proof on the fraudulent joinder issue. The removing defendants then sought a writ of mandamus from the 8th Circuit.

The 8th Circuit panel began its discussion by noting that the 8th Circuit standards governing

claims of fraudulent joinder have varied from “no reasonable basis in law and fact” to something resembling a Rule 12(b)(6) standard. The panel then established a new standard which focuses on whether the claim is “colorable” or whether it is “clear” that the claim against the non-diverse defendant is barred under state law. Under this standard, the district court is not required to make a definitive determination of the viability of the claim against a non-diverse defendant, but may remand the action if it finds that “there is a reasonable basis for predicting that the state’s law might impose liability against the [non-diverse] defendant.”

Agreeing with the district court that there was a “reasonable basis” for the claims against the non-diverse defendants, the appellate court dismissed the appeal for lack of jurisdiction. *Filla v. Norfolk Southern Railway Co.*, 336 F.3d 806 (8th Cir. 2003).

■ **ENFORCEMENT OF SETTLEMENT AGREEMENT; ANCILLARY JURISDICTION.** The parties reached a settlement agreement during a settlement conference before a magistrate judge and the terms of the settlement were read into the record. The following day, the district court issued an order dismissing the action with prejudice and retaining jurisdiction for 90 days during which either party could seek enforcement of the settlement. The parties exchanged drafts of settlement documents, but were unable to agree on the terms of a settlement agreement. Sometime after 90 days had passed, one defendant moved to enforce the settlement. The magistrate judge granted the motion, which was affirmed by the district court. The plaintiff then filed a motion for reconsideration, arguing that the district court lacked subject matter jurisdiction to enforce the settlement. That motion was denied, and the plaintiff appealed.

In *Kokkonen v. Guardian Life Ins. Co.* 511 U.S. 375, 114 S. Ct. 1673 (1994), the Supreme Court held that district courts do not have ancillary jurisdiction to enforce the terms of a settlement agreement unless the dismissal order explicitly retains jurisdiction over the settlement agreement, or the terms of the settlement agreement are incorporated into the dismissal order. Because the district court’s order of dismissal in this case did neither of these things, the 8th Circuit found that the district court lacked jurisdiction to enforce the settlement agreement, and remanded the action with instructions to reinstate the previous order of dismissal.

The 8th Circuit also noted that even if Rule 60(b) relief might have been available, it was inappropriate in this case where neither party disputed that a settlement had been reached. Finally, the 8th Circuit rejected the defendant’s argument that the district court had diversity jurisdiction over the renewed dispute, finding absolutely no evidence that the amount in controversy exceeded \$75,000. *4:20 Communications, Inc. v. The Paradigm Co.*, 336 F.3d 775 (8th Cir. 2003).

■ **DISCOVERY ABUSES; FAILURE TO CONSIDER POSSIBILITY OF LESSER SANCTION.** Plaintiff failed to turn over a substantial quantity of discoverable evidence until the eve of trial. Defendant then moved to dismiss plaintiff’s claims as a sanction for its conduct during discovery. The district court denied the dismissal request, but issued an order requiring the plaintiff to pay attorney’s fees and barred the introduction of substantial amounts of the plaintiff’s documentary evidence and testimony. At the close of the plaintiff’s case, the district court granted the defendant’s motion for judgment as a matter of law. The plaintiff then appealed.

Noting that sanctions orders are reviewed under a “very deferential” standard, and that it was “loath to reverse a district court’s sanction in the face of such clearly obstructionist conduct on the part of plaintiff and its attorneys,” the 8th Circuit nevertheless reversed the sanctions order, finding that the district court had failed to consider lesser sanctions, and that the wholesale exclusion of evidence was “tantamount to a dismissal of [the plaintiff’s] claims.” However, the prevailing plaintiff was not allowed costs for its appeal. *Heartland Bank v. Heartland Home Finance, Inc.*, 335 F.3d 810 (8th Cir. 2003).

■ **OTHER NOTEWORTHY DECISIONS.** A recent decision by Judge Kyle may be the first decision in the District of Minnesota to make clear that a Rule 12(b)(6) motion to dismiss is not a “responsive pleading” for purposes of Fed. R. Civ. P. 15(a). *Hjermstad v. Central Livestock Assoc., Inc.*, 2003 WL 21658260 (D. Minn. 07/14/03).

Judge Tunheim denied the plaintiffs’ motion to consolidate two employment discrimination actions against the same defendants, and simultaneously denied (without prejudice to renewal) a motion by the defendant in the latter of the two actions to sever the claims of the 15 plaintiffs in that action. *Madison v. Hennepin County*, 2003 WL 21639176 (D. Minn. 07/01/03); *Madison v. Hennepin County*, 2003 WL 21639221 (D. Minn. 07/01/03).

Two recent opinions addressing the issue of where depositions were to be conducted reached somewhat different results.

In the first case, Magistrate Judge Erickson held that the deposition of the defendant's supplemental Rule 30(b)(6) witness would proceed in Tokyo, and that the plaintiffs would be required to bear their own expenses in conjunction with that deposition, provided that the defendant consented to allow the conduct of the deposition to be governed by the Federal Rules of Civil Procedure. *Dwelly v. Yamaha Motor Corp.*, 214 F.R.D. 537 (D. Minn. 2003).

In the latter case, Judge Tunheim affirmed an order by Magistrate Judge Noel requiring the defendant to produce a New Jersey-based witness for a deposition in Minneapolis. *Carlson Wagonlit Travel, Inc.*, 2003 WL 21010961 (D. Minn. 03/08/03).

Judge Kyle conditioned the grant of the plaintiff's motion to dismiss pursuant to Fed. R. Civ. P. 41(a)(2) on the plaintiff's willingness to pay more than \$15,000 in legal fees and costs incurred by the defendants for work that would not prove of use in the event the plaintiff refiled its action. *EMPO Corp. v. J. D. Benefits, Inc.*, 2003 WL 21517360 (D. Minn. 06/26/03).

#### LOCAL RULES AMENDMENTS:

Presently pending are minor amendments to Local Rules 67.1 and 83.11.

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## INTELLECTUAL PROPERTY

### JUDICIAL LAW

■ **PATENTS; CLAIM CONSTRUCTION; PRIMACY OF ORDINARY AND CUSTOMARY MEANINGS.** In July the Court of Appeals for the Federal Circuit found that a trial court did not err during claim construction by looking to dictionary definitions *before* looking to the written description and file history. The reasoning: “[c]onsulting the written description and prosecution history as a threshold step in the claim construction process, before any effort is made to discern the ordinary and customary meanings attributed to the words themselves, invites a violation of our precedent counseling against importing limitations into the claims.” This case opens the door for litigants to argue that courts must first look to objective evidence (*e.g.*, dictionaries) of the ordinary meaning of patent-claim terms *before* looking at how the patentee used the term in its written description so as to avoid unnecessarily limiting the presumed ordinary meaning of the term in dispute. Stay tuned — just such a case is inevitable. *Intellectual Property Development, Inc. v. UA-Columbia Cablevision of Westchester, Inc.*, 02-1248 (Fed. Cir. 07/21/03),

■ **PATENTS; INTERFERENCE PROCEEDING; TWO-WAY TEST.** The Court of Appeals for the Federal Circuit has approved a “two-way” test to determine when two parties are claiming the same patentable invention for purposes of instituting an interference proceeding. An interference is declared if they are claiming the same invention. When applying the new “two-way” test, the patent office views each invention as if the other party's invention was available as prior art. For example, taking two inventions A and B, A must be viewed to see if B anticipates or renders obvious invention A, and vice versa. If *each* invention would have been anticipated or rendered obvious by the other, then the two inventions are the same patentable invention, and an interference proceeding is necessary. If one invention would not have been anticipated or rendered obvious by the other, then they are separately patentable inventions for purposes of declaring an interference. *Eli Lilly & Co. v. Board of Regents of the University of Washington*, 02-CV-1610 (Fed. Cir. 07/03/03),

■ **TRADEMARK INFRINGEMENT; DISCOVERY CONDUCT; CONFUSION; SANCTIONS.** In a recent trademark infringement case, the Court of Appeals for the 8th Circuit vacated sanctions that were tantamount to a dismissal of plaintiff's claims: exclusion of all plaintiff's actual-confusion witnesses. Despite affirming the lower court's determination that plaintiff's discovery conduct was sanctionable — calling it “highly improper” — the appellate court remanded for consideration of whether lesser sanctions were appropriate.

Actual confusion is powerful evidence in deciding whether there is a “likelihood of confusion” between trademarks. Plaintiff Bank claimed it had such evidence but only produced summaries during discovery. Just 20 days before trial, after discovery closed and settlement talks failed, Bank turned over the actual-confusion evidence that allegedly supported the summaries. It did not. Bank had misled defendant Heartland Home Finance (HHF), and the court, by not accurately summarizing the information. Bank's summaries failed to mention that many of those persons confused did not identify HHF, but rather an unrelated third party. “The [summaries] were based on the Bank's assumption about why people were confused ...rather than accurately reflecting what the documents say and what the callers actually said.”

Circumstantial evidence can be sufficient to meet a party's burden of proof in a trademark case: this is the lesson taught in the concurrence. The concurring opinion includes a well-explained overview of the court's precedents on the types of evidence that can be used to prove "likelihood of confusion" and "secondary meaning." The court reminds litigants that direct and indirect evidence (testimony, declarations, and surveys) are not the only way to meet a party's burden of proof. "[C]ircumstantial evidence (length and manner of mark use, advertising, sales, established in market, and copying) may be all that is available to establish secondary meaning." It can be enough.

*Heartland Bank v. Heartland Home Finance, Inc.*, 02-CV-2468 (8th Cir. 07/17/03).

■ **COPYRIGHT INFRINGEMENT; INSPIRATIONAL PHRASE; ADVERTISING.** The Court of Appeals for the 8th Circuit recently reinstated a jury award of \$570,000 in a copyright-infringement case. Andreas copyrighted an inspirational phrase. Audi used the phrase in a commercial to promote the then-new Audi TT. The jury awarded 10 percent of Audi's TT profits — \$570,000 — to Andreas, but the district court granted Audi's motion for JAML finding the profits too speculative. The Court of Appeals reversed and reinstated the jury's award holding that Andreas had proved the necessary causal connection between the infringement and Audi's TT profits: the infringement was the centerpiece of the TT commercial, Audi considered the commercial important, sales were above expectations during the time the commercial aired, and the commercial received awards. "The district court erroneously placed the burden of establishing the extent that the infringement contributed to Audi's profits on Andreas rather than on Audi as the infringing defendant." *Andreas v. Volkswagen of America, Inc. et al.*, 02-CV-2309, -2420 (8th Cir. 07/21/03).

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## JUVENILE LAW

### JUDICIAL LAW

■ **PARENTAL RIGHTS; MENTAL ILLNESS; NONCOMPLIANCE WITH "DUTIES IMPOSED BY PARENT-CHILD RELATIONSHIP."** In an unpublished decision, the Minnesota Court of Appeals affirmed a district court's termination of a mother's parental rights to her youngest child. Legal custody of the mother's three older children was transferred after the mother agreed to a voluntary out-of-home placement and testified that the transfer was in those children's best interest. When the mother's fourth child was born, he was immediately placed on a health and welfare hold and later returned to the mother's custody. He was again removed when police responded to a domestic disturbance call and found the mother's home in disarray. The Court of Appeals affirmed the trial court's decision to terminate parental rights, stating that the mother had not complied with the duties imposed upon her by the parent-child relationship. The mother had mental health and anger management problems that prevented her from properly caring for the child and she exhibited violent and disturbing behavior, including trying to force the child to eat solid food before he was old enough. The court also found that she failed to effectively treat her mental illness, that the mother had failed to correct the conditions leading to the out-of-home placement, did not follow day treatment program recommendations, and did not show that she would follow through with any of the other programming. *In re the Child of Peterson*, C7-02-2207 (Minn. App. 07/01/03) (unpublished).

■ **DELINQUENCY ADJUDICATION; CRIMINAL SEXUAL CONDUCT; WRITTEN FINDINGS, INDEPENDENT ASSESSMENT REQUIRED.** In another unpublished decision, the Minnesota Court of Appeals reviewed a delinquency adjudication where a minor was found delinquent for committing third-degree criminal sexual conduct in violation of Minn. Stat. §609.344, subdivision 1(b) and 2. The Court of Appeals found that the district court did not abuse its discretion in rejecting the minor's request for a stay of adjudication, but because the district court failed to order an independent assessment of the minor's need for sex offender treatment, and because it failed to provide written findings of the dispositional alternatives the court considered, the trial court was reversed and the dispositional order remanded. The state was directed to immediately produce and file with the district court the independent professional assessment, if one existed. If no assessment had been completed, the Court of Appeals directed the district court to order the testing as required by Minn. Stat. §260b.198, subdivision 1(k). The Court of Appeals refused to disturb the district court's order requiring this minor to register as a sex offender. *In the Matter of the Welfare of J.F.T, Child*, C4-02-1824 (Minn. App. 07/01/03).

■ **CHILD SUPPORT; ADOPTION SUBSIDY.** In a published decision, the Minnesota Court of Appeals addressed when a child's adoption subsidy is to be considered in setting child support. In this case,

when the parties separated, the mother had physical custody of the child and received the adoption subsidy that had been put in place at the time the parents adopted this child. A child support magistrate, in reviewing child support, found that while the father had higher income when the parties separated, he then lost his job and became reemployed at a lower income. The mother was receiving the monthly adoption subsidy at the time of separation.

The child support magistrate determined that the father was not entitled to a downward deviation from the child support guidelines and that the state adoption subsidy that the mother was receiving for the child could not be considered in setting the father's child support obligation. The district court reviewed the matter and affirmed.

The Court of Appeals, however, reversed this determination, finding that the district court should have considered the state adoption subsidy. The Court of Appeals cited Minn. Stat. §518.551, subd. 5(c)(1)(2) which requires a court to consider the financial means and resources of the child when setting child support. The court also cited previous determinations that state adoption subsidies were resources to consider for purposes of reimbursing the county for costs of out-of-home placement. The court also cited a provision from the Adoption Code which states that the receipt of an adoption subsidy does not affect eligibility for any other financial payment. Finally, the Court of Appeals noted that consideration of the subsidy was particularly reasonable where, as in this case, the father could not even cover his own expenses. While the court stated that adoption subsidies should not be treated as a mandatory offset to child support or a basis for an automatic reduction of the guideline amount, the question of how the subsidy affects the obligation depends on the needs of the child and the financial circumstances of the obligor and obligee. The matter was remanded to the district court to make adequate findings regarding the needs and resources of the parties involved.

*Strandberg v. Strandberg*, C6-02-2246 (Minn. App. 07/22/03).

■ **TERMINATION OF PARENTAL RIGHTS; SHAKEN BABY SYNDROME; EXPERT TESTIMONY.** In another unpublished termination of parental rights decision, the Court of Appeals affirmed a trial court's decision to terminate parental rights. This case involved the admission of shaken baby syndrome evidence, which the parents challenged.

With regard to the shaken baby syndrome evidence, there was competing and conflicting evidence from experts as to what caused the child's injuries. One expert stated that the injuries were the direct result of a shaken baby incident. The parents' expert testified that the child's injuries were the result of an impact injury instead of shaken baby syndrome. The trial court found the parents' expert testimony to not be credible because of the expert's lack of certain qualifications. The Court of Appeals affirmed that determination by the trial court.

The parents also challenged the admissibility of the expert testimony regarding the shaken baby syndrome, claiming it did not meet the *Frye-Mack* standard for novel scientific evidence. Here the Court of Appeal stated that although an expert's methodologies for making a medical diagnosis can constitute novel scientific evidence, shaken baby syndrome does not constitute such novel scientific evidence because it has been considered several times by appellate courts previously and that this is not a new scientific standard.

While the father also argued that the district court abused its discretion by determining that evidence of the parents' good character was not admissible for purposes proving that the person acted in conformity with character on a particular occasion, the Court of Appeals noted that because the character of a person alleged to have abused a child is not a material element of the statutory grounds for termination, and because the father sought to have the disputed evidence admitted in order to show that he acted in conformity with his alleged character traits on the occasions when the child was harmed, the district court did not abuse its discretion by excluding that evidence.

The guardian ad litem in the case testified that it was not in the best interests of the child for the parents' rights to be terminated. The guardian did not believe the child suffered egregious harm while in their care. The trial court did not adopt the guardian's opinions, and the Court of Appeals found that neither case law nor statutory law mandates that the district court adopt the guardian's opinion. The court observed that a guardian ad litem has no greater authority before the court than does any other party. *In the Matter of the Child of Mandy Green and Brad Green, Parents*, C3-03-125, C1-03-205 (Minn. App. 07/15/03).

#### PROCEDURAL RULES

The Minnesota Supreme Court has adopted changes to the Rules of Juvenile Procedure which become effective on September 1, 2003. Among the significant topics addressed by these rules are

the following: when children are allowed to waive counsel; issues regarding the right to representation by a public defender; circumstances when a child is to be given an opportunity to withdraw a plea or to obtain a new trial; the issuance of search warrants; photographing of the child; timing of trials when children are held in detention; dismissal of cases when dispositional orders are not entered within the time limits prescribed by the rules; criteria to be considered in orders following the waiver of a certification hearing and stipulations to certification orders; the initiation of extended jurisdiction juvenile proceedings and prosecution; and determinations of competency.

#### TRENDS AND DEVELOPMENTS

■ **ADOPTION; TERMINATION OF NONRESIDENT PARENTAL RIGHTS.** One issue that continues to cause confusion in Minnesota adoption practice is the ability of a Minnesota court to terminate the parental rights of a nonresident parent in the state of Minnesota. The state of Wisconsin recently grappled with this issue and concluded that the parental rights of a father who has never been to Wisconsin may be terminated by a Wisconsin court at the request of his former wife so that her husband may adopt the child. The Wisconsin Supreme Court held that such a proceeding, which it found to fall under the Uniform Child Custody Jurisdiction Act (UCCJA), was covered by the status exception to the minimum contacts requirement for personal jurisdiction. The Wisconsin Supreme Court noted that most other jurisdictions have likewise held that the exception applies to UCCJA cases. Presumably, under Wisconsin's analysis, the same exception would apply under the UCCJEA which many, including Minnesota, have adopted. *Tammie J.C. vs. Robert T.R.*, No. 01-2787 (Wisc. Sup. Ct. 06/20/03).

■ **INDIAN CHILD WELFARE ACT; "EXISTING FAMILY DOCTRINE."** The North Dakota Supreme Court recently considered "the existing family doctrine." This doctrine has been used by several states to avoid applying the Indian Child Welfare Act (ICWA) in termination of parental rights cases and adoption cases involving Indian children. Minnesota has never adopted this doctrine. The North Dakota Supreme Court has also rejected it. The context of the case was an issue of the timeliness of a tribe's motion to transfer a custody case from state court to tribal court. Along the way in this analysis, the North Dakota court specifically rejected the "existing Indian family doctrine". This doctrine is a judicially created exception which provides that ICWA does not apply to a situation where an Indian child and his or her family have minimal ties to an Indian tribe. The Court rejected this as a judicially created exception to the ICWA which it found to be contrary to the plain language of the ICWA which was enacted to protect a tribe's interest and the welfare of its children. *Hottz v. K. B.*, 2003 N.D. 1998 (N.D. Sup. Ct. 06/17/03)

■ **FEDERAL JUVENILE DELINQUENCY ACT; PROBATION REVOCATION; TERM OF DETENTION.** Recently, the 8th Circuit Court of Appeals in a case originating in the Federal District Court of South Dakota, held that in revoking an juvenile offender's probation, the district court did not err in applying the Federal Juvenile Delinquency Act (18 U.S.C §§5031-5042)(2000). The trial court did err in determining that it could enter an order imposing up to five years of detention. However, since the sentence imposed, that being 37 months, was equal to the term which a similarly situated adult could have received, the error in the court's analysis was harmless. Further, the district court did not err in using the juvenile's age at the time of the probation revocation hearing to determine her sentence. *U.S. v. K.R.A.*, No. 02-1322 (8th Cir. 07/24/03).

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## REAL PROPERTY

### JUDICIAL LAW

■ **ZONING.** The owner planned to rebuild a three-unit dwelling destroyed by fire, however the dwelling did not comply with current zoning ordinances. On April 9, 2001, the owner submitted an application for a building permit and on May 3, 2001, the owner filed a zoning application. On June 20, 2001, the city notified the owner that it was extending the 60-day deadline to issue its final decision on the zoning matters. The district court granted the owner's petition for a writ of mandamus concluding the extension notice was untimely and ordered the city to issue a building permit. The Court of Appeals reversed the district court decision finding that the 60-day deadline imposed by Minn. Stat. §15.99 governed the zoning application not the owner's application for a building per-

mit. Therefore, the city timely delivered the notice of extension. **Advantage Capital Management v. City of Northfield**, C2-03-1904, C6-02-1923, C5-02-1928 (Minn. App. 07/08/02).

■ **LIENS/LABOR.** The contractor entered into an agreement with the subcontractor to perform excavation and concrete work for two residential projects. The subcontractor completed the work and the property owners paid the contractor for the subcontractor's services. However, the contractor did not pay the subcontractor; as a result the subcontractor brought this action against the contractor and its shareholders, officers and agents. The court partially affirmed the district court's grant of summary judgment finding that the contractor should have been licensed as a residential remodeler or building contractor according to Minn. Stat. §326.84, since the contractor provided two special skills "masonry and concrete" and "excavation." Consequently, the contractor and its agents were liable under certain provisions of Minn. Stat. §514.02 for not paying for the subcontractor's services. On the other hand, the court held that §514.02 prohibits a finding of fiduciary liability and vacated the joint-and-several judgment, remanding this matter for further consideration. **Duluth Superior Erection, Inc. v. Concrete Restorer, Inc. et al.**, C1-02-1831 (Minn. App. 07/15/03).

■ **ABANDONMENT.** In 1898 the prior land owners gave a deed conveying certain land to the railroad. The deed stated that the conveyance shall continue so long as the land is used for a railroad right of way but terminates upon removal of the tracks. In 1985 the railroad obtained a certificate of abandonment from the Interstate Commerce Commission and, after several failed attempts to sell the property, removed its tracks. In 1988 the Department of Natural Resources (DNR) purchased the railroad land to establish the Paul Bunyan State Trail. The DNR maintained the recreational trail for ten years until adjacent land owners installed barricades on portions of the trail claiming ownership of part of the land. As a result, the DNR filed this quiet title action. The court concluded that the deed conveyed an easement to the railroad and not a fee simple determinable interest, with possibility of reverter. When the railroad received the certificate of abandonment and removed its tracks, it abandoned the land and under the terms of the deed the easement terminated, therefore the DNR has no right to the land because the railroad abandoned the easement before the transfer occurred. **Minnesota v. Hess et al.**, C4-02-2049 (Minn. App. 07/29/03).

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## TAX

### JUDICIAL LAW

■ **TAXPAYERS SUBJECT TO MINNESOTA TAXATION ON INCOME DESPITE CLAIMS.** The Minnesota Tax Court held that \$150,000 of income in 1998 and \$290,000 in 2000 were subject to taxation in Minnesota over the taxpayer's objections. The Tax Court indicated that the definition of gross income, as set forth in IRC §61(a) is broad, and is includable in Minnesota taxable income since the starting base is federal taxable income under Minn. Stat. §290.01 subd. 19. Furthermore, the taxpayer's claims of unconstitutionality had been previously rejected by the federal court and courts in Minnesota. Therefore, the taxpayers' claim that they had zero taxable income for 1998 and 2000 was without merit. **Bryan and Melinda Anderson v. Commissioner of Revenue**, No. 7500-R, 2003 WL 21458711 (Minn. T. Ct. 06/18/03).

■ **APPEAL DISMISSED FOR LACK OF PROSECUTION.** The Minnesota Tax Court dismissed the taxpayer's action for lack of prosecution of the appeal. Repeated but unsuccessful efforts by the attorney general to contact the taxpayer and the taxpayer's failure to maintain contact with the court caused the court to dismiss the appeal under Minnesota Rules of Civil Procedure R. 4.02. However, the court allowed the taxpayer ten days before its order became final in which she could make a motion to reinstate, provided there was a showing of good cause for failure to prosecute the appeal. **Gloria J. Lawler v. Commissioner of Revenue**, Docket No. 7406-R, 2003 WL 21488147 (Minn. T. Ct. 06/25/03).

■ **SALES RATIO STUDIES; CLAIM OF UNEQUAL ASSESSMENT.** The Minnesota Tax Court denied the taxpayer's claim of unequal assessment of property taxes for the assessment year 2001 payable in 2002. The court also used the nine-month "suburban" countywide sales ratio study made by the Department of Revenue. **Rinkel Family Limited Partnership v. County of Ramsey**, Docket No. CX-01-6589, 2003 WL 21359576 (Minn. T. Ct. 06/10/03).

■ **SALES TAX; SALES TO CONTRACTORS.** The Minnesota Tax Court held that a sales and marketing company selling wire and cable to contractors was liable for the collection of the sales tax. Minn. Stat. §297A.01, subd. 4 specifically designated the sale of items to contractors as "retail sales"

or “sales at retail.” Therefore, the business’s contention that it made sales for resale was incompatible with caselaw and the plain meaning of the statute. Furthermore, the business failed to present evidence that its customers had resold the materials that they had purchased from the business and charged sales tax. Lastly, many of the business’s customers recognized their responsibility for remitting the tax by paying it to the business after the appeal was filed. On a separate issue, the court indicated that the mere fact that a customer was performing work for the federal government did not mean that the contractor was not taxable on his purchases from the business. ***New Sunrise Beginnings, Inc. v. the Commissioner of Revenue***, Docket No. 7478, 2003 WL 21729577 (Minn. T. Ct. 07/03/03).

■ **REAL PROPERTY EXEMPTION.** The Minnesota Tax Court denied a motion for reconsideration and upheld its prior ruling that the taxpayer qualified for real property tax exemption. After the original decision of the Tax Court, the Legislature repealed the statute. The county attorney then made the argument that the intent of the Legislature in the original legislation was not to provide the tax benefit to the taxpayer at hand. The county submitted a tape of alleged intent by the Legislature in repealing the real property exemption in 2003. The court however, denied the petition for reconsideration because the extract from the tape did not support what the Legislature’s intent was in 1993, the time of original passage of the exemption. Why the Legislature was repealing the 1993 law was too speculative. ***ILHC of Eagan, LLC v. County of Dakota***, Docket No. C0-01-7361 and CX-02-7460, 2003 WL 21459248 (Minn. T. Ct. 06/17/03).

■ **FAILURE TO TIMELY FILE NOTICE OF APPEAL.** The Minnesota Tax Court dismissed the taxpayers’ notice of appeal for years 1993, 1994, 1995, 1996, 1998, 2000, and 2001. The dismissal was warranted because the taxpayer did not file the notice of appeal within 60 days of the order or did not file returns, or the commissioner did not file returns for them. The court reiterated that the 60-day period was jurisdictional. Lastly, the taxpayers were free to bring a new appeal with respect to years 1996, 1999, 2000, and 2001 after the commissioner has issued an appealable order. ***Ronald R. and DeeNelda L. Johnson v. Commissioner of Revenue***, Docket No. 7457, 2003 WL 21246350 (Minn. T. Ct. 05/29/03).

■ **TENANT’S MOTION FOR INTERVENTION AND CONSOLIDATION DENIED IN REAL PROPERTY ACTION.** The Minnesota Tax Court denied a law firm’s motion for intervention and consolidation in a real property tax action taken by the landlord. Although the action was still pending, a signed stipulation of settlement was signed between the county and the landlord at the time the motion was made. The Tax Court recognized that while the law firm as a lessee had an interest in the real property, it had to meet the tests set forth in Minn. R. Civ. P. 24.01 in its application for intervention. The elements for intervention used by the court were: filing a timely application to intervene; showing an interest relating to the property; demonstrating circumstances that the disposition of the action may as a practical matter impair or impede the other party’s ability to protect that interest; and a showing that the intervening party is not adequately represented by the existing parties. In applying these tests, the court held that the law firm had adequate notice of the action initiated by the landlord. Even though the action would preclude the law firm from further disputing the real property valuation if intervention was denied, the proceeding had progressed too far and there would be prejudice to the settling landlord by reopening the matter at this late stage. The court also denied the law firm’s request to consolidate on a similar basis to that which the court had used to deny intervention. ***ZIRP-IC, LLC v. County of Hennepin***, Docket No. 29185, 2003 WL 21729716 (Minn. T. Ct. 07/03/03).

■ **SALE-LEASEBACK; SHAM TRANSACTION; REMAND.** The D.C. Circuit Court of Appeals upheld the Tax Court’s shutdown of a sham transaction in which a limited liability company taxed as a partnership was the center of a complex sale-leaseback transaction involving computer equipment. The transaction was designed primarily to generate significant tax savings through an “arbitrage” setting off the differences in the U.S. taxes and the tax system of other countries, which did not treat the proceeds of the transactions as taxable. The court also remanded to the Tax Court for further proceedings the remaining issues about allocation of the deductions to the partners and jurisdictional questions. ***Andantech LLC, et al. v. Commissioner***, Nos. 02-1213 and No. 02-1215, 91 AFTR 2d ¶2003-2623 (D.C. Cir. 06/17/03).

■ **CLIENT INVESTORS’ ANONYMITY IN PROCEEDINGS AGAINST FIRM THAT MARKETED INVESTMENTS.** Clients of accounting firm, who invested in potentially abusive tax shelter marketed by the firm and were listed on a log maintained by the firm in compliance with IRS regulations, are entitled to intervene anonymously in proceedings commenced by the IRS to enforce summonses

issued by IRS to the firm. **United States v. Arthur Andersen LLP**, No. 02 C 6790, 92 AFTR 2d ¶2003-5207 (ND. Ill. 06/30/03). See also *United States v. BDO Seidman LLP*, Nos. 02-3914 and 02-3915 (7th Cir. 07/23/03) (7th Circuit concluded that investors in tax shelter transactions marketed by firm were not entitled to claim “tax practitioner-client” privilege under IRC 7525, to prevent Seidman from disclosing documents to IRS that would reveal their identity.)

■ **CHALLENGE TO DEBTOR’S ALLOCATION OF PARTNERSHIP LOSSES.** Commissioner may not challenge a taxpayer’s allocation of partnership losses between himself and his bankruptcy estate in a proceeding involving only the taxpayer-debtor, but must first bring a partnership-level proceeding. **Katz v. Commissioner**, No. 01-9009, 92 AFTR 2d ¶2003-5153 (10th Cir. 07/07/03).

■ **GIFTS OF RESTRICTED SHARES; FAMILY LLC; NO PRESENT ECONOMIC BENEFIT.** Transfers made by taxpayer to his children and their spouses of restricted shares in a limited liability company that he formed after his retirement and to which he contributed recently purchased tree farms and cash and securities are not eligible for the \$10,000 annual gift tax exclusion. The transfers were gifts of future interests in property. **Hackl v. Commissioner**, No. 02-3093, 92 AFTR 2d ¶2003-5254 (7th Cir. 07/11/03).

■ **RELIEF FROM JOINT LIABILITY DENIED; RES JUDICATA.** Summary judgment is granted for IRS on *res judicata* grounds with respect to taxpayer’s claim for relief from joint and several liability. In view of taxpayer’s meaningful participation in the IRS’s prior district court collection action in which taxpayer raised only frivolous arguments and did not claim relief from joint and several liability. **Thurner v. Commissioner**, 121 T.C. No. 3 (07/11/03).

■ **DEDUCTION FOR IN-KIND COMPENSATION.** Employer’s deduction for property transfers made to compensate employees is the value of the transferred property that is includable in the employee’s gross income as a matter of law. The deduction is not limited to the value of the transferred property that actually is included in the employee’s gross income, either on the employee’s return or as a result of a final IRS determination. **Robinson v. United States**, No. 02-5154, 92 AFTR 2d ¶2003-XXXX (Fed. Cir. 07/15/03).

■ **DIFFERENTIAL RATES ON GAMBLING REVENUES UPHELD; IOWA.** The U.S. Supreme Court unanimously ruled that Iowa can tax the revenue from slot machines at parimutuel racetracks at 36 percent and the revenue from all casino games on riverboats at 20 percent, including slot machines, without violating the Equal Protection Clause of the Constitution. **Fitzgerald v. Racing Association of Central Iowa**, No. 02-695 (U.S. 06/09/03).

■ **ACCUMULATED EARNINGS; REASONABLE BUSINESS NEEDS.** Closely held companies serving the marine transportation business needs of the oil and gas industry did not retain or accumulate their earnings under IRC §531 in the early 1990s beyond their reasonable needs for fleet replacement, new business opportunities, working capital, and shareholder redemption. Therefore they were not liable for tax on the accumulated earnings. **Otto Candies LLC v. United States**, No. 99-3692, 91 AFTR 2d ¶2003-2520 (E.D. La. 05/28/03).

■ **MOLTEN TIN DEPRECIABLE ASSET.** Volume of molten tin originally existing at flat glass manufacturing plant at the time the taxpayer purchased the plant from its previous owner constituted a depreciable asset under IRC §§167 and 168. The court rejected reliance on an IRS ruling, which advised that the initial installation of tin used in the float process manufacture of glass was not depreciable property. See Rev. Rul. 75-491, 1975-2 C.B. 19. Noting that the revenue ruling hadn’t been tested in courts or otherwise reconsidered by the IRS, it concluded that the district court did not err in declining to treat the revenue ruling as controlling. The appellate court reversed the district court and concluded that the reallocation of assets between groups was not a change in accounting method under IRC §446(e). **O’Shaughnessy v. Commissioner**, No. 02-1532, 91 AFTR 2d ¶2003-2559 (8th Cir. 06/13/03).

■ **RECOVERY OF COSTS; “SETTLEMENT LIMITATION” NOT APPLICABLE.** “Settlement limitation” under IRC §7430(c)(4)(E)(ii)(I) on provision entitling taxpayer to recover litigation costs incurred after making a qualified offer under IRC §7430(c)(4)(E) on a substantive tax adjustment is not applicable after litigation has occurred. Court determinations have been made on arguments or issues relating to the adjustment in question. **Gladden v. Commissioner**, 120 T.C. No. 16 (06/27/03).

■ **CREDIT FOR TAX PAID IN OTHER STATES.** Chicago Cubs slugger Sammy Sosa struck-out in Illinois’ Cook County Circuit Court, where a judge ruled he could not claim a tax credit based on income taxes paid in other states. **Sosa v. Bowen, Ill. Cir. Ct., No. 02 L 50670 (Ill. Cir. Ct. 06/26/03).**

■ **DENIAL OF REQUEST FOR INTEREST ABATEMENT; REVIEW.** Neither sovereign immunity nor the grant of jurisdiction to the Tax Court operates to bar relief in the district courts for a claim for the

abatement of interest brought under IRC §7422 of the tax code. Although the Code provides the Tax Court with jurisdiction to hear these cases, the 5th Circuit determined that the Tax Court's jurisdiction isn't exclusive, but concurrent with that of the district court. *Beall v. United States*, No. 01-41471, 92 AFTR 2d ¶2003-5001 (5th Cir. 06/27/03).

■ **PARTNERSHIP'S TAX DEBTS; SEPARATE ASSESSMENT OF PARTNERS.** The U.S. Supreme Court will review a decision holding that an assessment for employment tax liabilities against a partnership wasn't an assessment against the individual general partner-debtors because they were separate taxpayers. Under the 9th Circuit's view, the assessment extended only the partnership's statute of limitations; it didn't affect the general partner-debtors' three-year statute of limitations. Since the IRS didn't timely obtain judgment against the partner-debtors, it couldn't collect from them. *U.S. v. Galletti (In Re Galletti)*, 91 AFTR 2d ¶2003-723 (9th Cir. 11/20/02), *cert. granted*.

■ **S CORPORATION STOCK AS MARITAL PROPERTY.** The Minnesota Supreme Court decided the issue of whether a Subchapter S corporation's earnings retained in an Accumulated Adjustments Account ("AAA") constituted marital property. The husband owned nonmarital stock in a Subchapter S corporation. The Court held that the husband's interest in the AAA was nonmarital property because the retained earnings in the AAA did not constitute income under the plain meaning of Minn. Stat. §518.54(6). The husband did not have a distributive right or substantial control over the AAA, and the retained earnings in the AAA were not attributable to the husband's entrepreneurial efforts during the marriage. *In Re Marriage of Janis Edwards Gottsacker v. Gregory Alan Gottsacker*, Docket No. C1-02-615, 2003 WL 21665016 (Minn. 07/17/03).

#### ADMINISTRATIVE MATTERS

■ **AMENDED MINNESOTA INCOME TAX RULES.** The Minnesota Department of Revenue amended Income Tax Rules concerning residency, the definition of "domicile," and the estimated tax payments of husbands and wives. Minnesota Rules, Parts 8001.0300 and 8093.0200 (27 SR 1160 Jan 21, 2003).

■ **INCOME TAX — K-12 EDUCATION CREDIT.** In Minnesota Department of Revenue Notice No. 03-05 (06/03/03), the commissioner explained the specific requirements that must be followed if a vendor offers a package of educational services and products to a purchaser for the K-12 Education Credit. The Revenue Notice also discusses the K-12 Education Credit allowance for payments made for "education-related expenses in the tax year" and the purchaser borrowing the money for the purchase of a qualified educational product and agreeing to repay the loan by assigning the right to their Minnesota tax refund to the lender.

■ **SALES TAX — BURGLAR AND FIRE ALARM, DETECTIVE, SECURITY, AND ARMORED CAR SERVICES.** Minnesota Department of Revenue in Revenue Notice #03-07 explained which detective and security devices are subject to sales and use tax and which are tax exempt. It lists the particulars on the taxation of the burglar and fire alarm, detective, security, and armored car taxable services found in the Minnesota Sales and Use laws. Revenue Notice 03-07 revoked Revenue Notice 92-06: "Sales and Use Tax Detective Services."

■ **ABUSIVE FOREIGN ENTITY RECLASSIFICATION.** The IRS is withdrawing a controversial rule cracking down on "extraordinary transactions" involving abusive elections of disregarded entity status by foreign taxable entities to avoid U.S. tax on reorganizations or dispositions. The proposed rules (REG-110385-99) issued in 1999 drew widespread criticism for being overly broad. The rule would have operated to change the classification of a foreign entity for tax purposes if certain transactions occurred within a year of the date the entity elected disregarded status. Plans are under way to finalize other, noncontroversial parts of the proposed rules promptly. Notice 2003-46, IRB 2003-28 (07/14/03).

■ **REQUESTING TAX RETURN TRANSCRIPTS.** When you need a transcript of your client's filed income tax return, there are two easy ways to request it — by phone or mail.

**Phone:** Call the Practitioner Priority Service (PPS) toll-free at 866-860-4259 and follow the prompts to use the automated system or speak with an IRS representative. If the IRS has your client's authorization on file, it will mail the transcript to you. For more than ten requests, please use the IRS mail option.

**Mail:** Complete Form 4506, Request for Copy or Transcript of Tax Form, have your client sign it, and mail it to the address shown in the instructions. Get Form 4506 by calling 800-829-3676 to receive it by mail, or IRS TaxFax at 703-368-9694 using a fax machine's handset to receive the form on your fax machine. The form is also on the IRS website in a fill-in format at <http://www.irs.gov/pub/irs-fill/f4506.pdf>.

Allow two weeks for delivery when requesting free transcripts.

**Coming Fall, 2003:** Tax professionals who e-file 100 or more accepted individual tax returns and register for IRS's e-services will be able to request and receive transcripts in secure online sessions when the new Transcript Delivery System (TDS) rolls out. Via TDS, up to 25 transcripts will appear on-screen almost instantly, with bulk requests (more than 25) delivered to a secure mailbox for pick-up, generally with 48 hours. For more information on TDS and other e-services, visit <http://www.irs.gov/efile/article/0,,id=106801,00.html>.

■ **SECTION 338 ELECTION; AVOIDING STEP TRANSACTION DOCTRINE.** The IRS issued final and temporary and proposed regulations that allow corporations to treat one step in a multistep transaction as a qualified stock purchase under IRC §338. Under the temporary and final regulations, the IRS will not apply the step transaction doctrine when a taxpayer makes an IRC §368(h)(10) election for one step in a multistep transaction, if that step, standing alone, would be a qualified stock purchase. If the taxpayer does not make the election, the examples in the regulations make it clear that IRS will apply the step transaction doctrine and will treat the transaction as a reorganization described in IRC §368(a). The final and temporary regulations apply to stock acquisitions occurring on or after July 9, 2003. T.D. 9071, REG-143679-02.

■ **NEW FILING AND DISCLOSURE WEBSITE FOR POLITICAL ORGANIZATIONS.** The IRS in a news release announced the launch of its new website for political organizations to electronically file required documents. The new site also greatly improves public access to such organizations' filings, permitting users to view, search, or download the entire database of electronic filings, to learn contributors' names and the amounts and dates of their contributions, and to review lists of expenditures. The new Political Organizations Filing and Disclosure website was developed to reflect congressional changes in November 2002 intended to ensure that political organizations with tax-exempt status, also known as Section 527 political organizations, disclose essential information on a timely basis. It replaces the prior filing and search site that was developed in 2000 in response to earlier legislation. IR 2003-87.

■ **EMPLOYEE LEASING COMPANY, NOT CLIENTS, SUBJECT TO MEAL DEDUCTION LIMITATION.** In a Chief Counsel Advice, the IRS addressed the issue of whether an employee leasing company or its clients would be subject to the IRC §274(n) deduction limitation, regarding workers' meal and beverage expense reimbursements. The IRS determined the company was the "payor" under an accountable plan and IRC §274(e)(3)(B) was inapplicable to it, so the leasing company was subject to the IRC §274(n) 50 percent meal disallowance. CCA 200317016.

■ **ALTERNATIVE MINIMUM TAX.** Some small corporations have been reporting and paying federal alternative minimum tax (AMT) for which they are not liable. The AMT was repealed for qualifying small corporations for tax years beginning after December 31, 1997, but some of these businesses continue to compute and pay AMT on form 1120, U.S. Corporation Income Tax Return. For more information on the rules about AMT, visit the IRS's website at <http://www.irs.gov/businesses/small/article/0,,id=110137,00.html>.

■ **LMSB IRS DIRECTORY, ORGANIZATIONAL CHART.** The Large and Mid-Size IRS Business Division has updated their directory and posted it to the website along with a file that has their organizational chart. If you work with that group, you may wish to download and keep handy these items. This directory has a version date of June 2003. The organizational chart is a MS Powerpoint file of one slide and is also dated June 2003. The directory can be found at: [http://www.irs.gov/pub/irs-utl/lmsb\\_directory\\_rev6-2003\\_31111f03.pdf](http://www.irs.gov/pub/irs-utl/lmsb_directory_rev6-2003_31111f03.pdf). The organizational chart can be found at: [http://www.irs.gov/pub/irs-utl/org\\_chart\\_6-03.ppt](http://www.irs.gov/pub/irs-utl/org_chart_6-03.ppt).

■ **EQUITABLE RELIEF FOR INNOCENT SPOUSES.** Long-awaited guidance was issued by the IRS for taxpayers seeking equitable relief from joint and several liability under a 1998 law intended to help "innocent spouses," who do not want to be held liable for their partner's taxes. In Revenue Procedure 2003-61, the IRS sets out conditions under which it will grant equitable relief for underpayments of income tax reported on a joint return under tax code IRC §6015(f). The IRS added a new threshold condition under which taxpayers will be eligible for relief even if items of income were attributable to the requesting spouse under certain circumstances.

#### LEGISLATION

■ **MINNESOTA "BABY TAX BILL".** The 2003 Legislature enacted the Omnibus Tax Bill, dubbed the "baby tax bill," which made significant changes in the various Minnesota taxes. The full text is found in Chapter 127 (S.F. 1505), Laws 2003, effective May 25, 2003, except as otherwise noted.

The highlights are set forth below:

■ **MINNESOTA ADMINISTRATIVE PROVISIONS: OIC, COLLECTIONS.** Senate File 1505 also updates offers-in-compromise (OIC) and creates an advance collection program to collect taxes that otherwise would not be collected. Under the new law, the Minnesota Attorney General may compromise taxes, fees, penalties, and interest for debts being reduced by an amount greater than \$50,000. Debts reduced by \$50,000 or less can be compromised by state agencies.

The legislation also authorizes an advance collection program to collect tax, interest, and penalty obligations that would otherwise go uncollected. The Minnesota commissioner of revenue may offer a reduction of up to 35 percent for obligations that are more than two years old and a reduction up to 50 percent for obligations four or more years old. The commissioner may choose or exclude any debt the commissioner deems appropriate under the new law.

■ **MISCELLANEOUS MINNESOTA SALE AND USE TAX.** In addition, generally effective Jan. 1, 2004, the 2003 sales and use tax legislation in Senate File 1505 (Chapter 127) and Special Session H.F. 7 (Chapter 21) provides:

■ Minnesota conformed its sales and use tax laws to most of the provisions of the Streamlined Sales and Use Tax Agreement. These conforming changes include the effect of registrations, bad debt, amended and newly enacted definitions, sourcing rules, multiple points of use, suits against the seller for overpayment, local taxes, and relief from tax liability for erroneous data provided by the state;

■ Sales of prewritten computer software are taxable, whether delivered electronically, by load and leave, or otherwise;

■ The capital equipment exemption applies to equipment used for research, development, design, or production of computer software;

■ Concrete ready-mix equipment, and not the vehicle the equipment is mounted to, qualifies as exempt capital equipment;

■ The provision relieving out-of-state retailers from local sales tax collection is repealed;

■ A six-month sales and use tax exemption is allowed for preexisting construction bids or contracts when statutory provisions are enacted to impose sales tax on goods or services and no transitional period is provided, effective May 26, 2003;

■ Additionally, the sales and use tax legislation provides for purchaser refund claims, explains the integrated production process for the capital equipment exemption, and repeals an exemption for used farm tires along with other obsolete provisions; and

■ A penalty is imposed for the failure to properly complete a sales tax return equal to 5 percent of the tax improperly reported on the return, effective for sales tax returns filed after June 30, 2003. In addition, a person who files a consolidated sales tax return but fails to report location information is subject to a \$500 penalty for each return not containing the information, also effective for sales tax returns filed after June 30, 2003.

■ **MINNESOTA PROPERTY TAX PROVISIONS.** Numerous property tax exemptions are enacted for property owned by the Comprehensive Health Association, private cemeteries, the Western Lake Superior Sanitary Board, unfinished sale or rental projects, pedestrian skyways, municipal recreation facilities, and water and wastewater treatment facilities, all effective May 26, 2003. The expiration date for the property tax exemption for business incubator property, scheduled to expire after taxes payable in 2005, is extended to expire after taxes payable in 2011.

■ **SEVERANCE TAX PROVISIONS.** The amount of taconite tax payments to be made by February 24 is stabilized at 50 percent of the total tax due, with the remainder due by August 24. The amount was scheduled to increase to 100 percent of the tax due for the February payment, for tax years payable in 2004 and thereafter. In addition, the credit equal to \$.04 per gross ton of taxable iron ore concentrate produced by taconite plants is revealed, effective for concentrates produced after January 1, 2003.

■ **CIGARETTE TAX PROVISIONS.** The discount allowed on cigarette tax stamps is eliminated, effective for stamps sold after June 30, 2003. A fee is imposed on the sale of "nonsettlement" cigarettes (cigarettes manufactured by entities that are not making payments under the cigarette settlement agreement) equal to \$.0175 per cigarette, effective for sales of nonsettlement cigarettes made after June 30, 2003.

#### LOOKING AHEAD

■ **STATE REVENUES FINISH 2002-03 BIENNIUM ON TARGET.** Minnesota's net general fund receipts were almost exactly as forecasted in the fiscal year just concluded according to a report issued in July

by the State's Finance Department. Receipts were just \$10 million (less than 0.1 percent) below February's forecast of \$12.618 billion. Individual income tax receipts were \$133 million less than forecasted, principally due to larger than anticipated refunds and lower final payments for tax year 2002. However, mortgage and deed tax receipts were \$44 million more than forecasted, helping to offset the lower than anticipated individual income tax revenues. During the last quarter, revenues were \$66 million below the previous forecast. The national economic outlook for the next biennium has been cut back and is likely to lead to a reduction in the revenue forecast due to be issued in November. Fortunately, the state's 2004-05 budget includes a reserve of more than \$500 million. July's baseline forecast from Global Insight, the state's national macroeconomic consultant, calls for the U.S. economy to strengthen during the remainder of this year, with real GDP growing at a 2.8 percent annual rate during the 2004 fiscal year and at a 3.8 percent annual rate in fiscal 2005. The February revenue forecast assumed an even stronger economy during 2004 and 2005 with real growth rates of 4.1 percent and 4.2 percent. The July Economic Update can be found on the Finance Department's website at [www.finance.state.mn.us](http://www.finance.state.mn.us).

■ **CORPORATE TAX SHELTERING LINKED TO BILLIONS IN LOST TAX REVENUES.** Corporate tax sheltering reduced state corporate income tax revenues by more than a third in 2001, according to a new national study from the Multistate Tax Commission ("MTC"). The findings indicate that state corporate income tax revenue, which totaled \$35.4 billion in 2001, would have been as much as \$12.38 billion (or 35 percent) higher had such widespread tax sheltering of income not taken place. Minnesota may have lost out on \$129 million in corporate tax revenue in 2001 — or 17.6 percent of its total corporate tax collections that year — because of domestic and international tax shelters of businesses. The majority of the revenue losses in the states are linked to such "exotic" tax sheltering techniques as: reincorporating strictly for tax income purposes in Bermuda; creating separate corporations to house "intangibles" (e.g., trademarks) and then siphoning profits away from taxation in the states in which the companies actually do business; shifting taxable income away from the U.S. to other nations through the pricing of goods and services involved in transactions between jointly owned companies; and using complex interpretations of tax laws to create so-called "no where income" that is earned by a corporation but then not reported to states that impose corporate income taxes. The full text of the MTC study, including rankings for individual states, is available on the web at <http://www.mtc.gov/statebudgetcrisis.html>.

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## TORTS & INSURANCE

### JUDICIAL LAW

■ **NO FAULT; DEFINING INSURED PARTIES; RENTAL VEHICLE.** Employee was injured in an accident while driving a rented car, paid for and arranged by his employer. After settling his claims with the at-fault driver's insurer, employee brought an action for UM/UIM benefits against both his personal insurer (MSI) and his employer's insurer (LM). The insurance companies sought a declaration from the court as to which insurer was primarily responsible for UM/UIM coverage. The district court determined LM was primary, holding the employee was an "insured" for purposes of UM/UIM and the rental car was a "covered auto" under Minnesota law.

The Court of Appeals reversed, finding that the rental car was not a "covered auto" under the policy definition. The court went on to hold that if a policy's definition of "insured" does not conflict with the Minnesota no-fault statute (providing "insured" includes the named insured and family members residing the same household), then the policy may use separate definitions of "insured" for liability and UM/UIM coverage.

The court also held that commercial policies need not cover UM/UIM claims on rental vehicles unless their policy provides rental coverage. However, commercial and personal policies must provide damage and loss of use of a rented private passenger vehicle. *Mutual Service Cas. Ins. Co. v. Liberty Mutual Fire Ins. Co.*, C9-02-2029 (Minn. App. 06/17/03).

■ **AUTOMOBILE INSURANCE; NOTICE OF CANCELLATION.** Milbank Insurance Company insured Debra Knutson's automobile. After failing to receive a premium payment, Milbank sent Knutson a notice of cancellation. Approximately two weeks after the ten-day cancellation period had expired without payment, Knutson was in a car accident. Jorgensen, a passenger in the other vehicle, was injured and sought to garnish Milbank's policy based on a settlement with Knutson. The district court held the notice of cancellation provided Knutson only nine days notice (since it failed to

exclude holidays and weekends), and was therefore completely ineffective, resulting in coverage at the time of the accident.

The Supreme Court affirmed in part, reversed in part, and remanded. The Court affirmed the use of the Minnesota time-computation statute §645.15 (2002) (excluding holidays and weekends), to calculate the ten-day notice requirement. The Court reversed the lower court's decision regarding the effect of failure to properly calculate the ten-day cancellation period, however, holding that if an insurance company improperly calculates the notice period, but gives at least ten calendar days notice, the effect is to extend the cancellation date until the correctly calculated expiration date. **Jorgensen v. Knutson & Milbank Ins. Co.**, C801-1685 (Minn. 06/19/03).

■ **AVIATION INSURANCE; EMPLOYEE PASSENGERS; WORKERS' COMPENSATION.** A business owner and his employee were killed in a plane crash en route to a business meeting. The insurance policy excluded coverage of employees for work-related injuries. The deceased employee's estate sued the business owner's estate for wrongful death. The aviation insurer defended the claim, denied coverage, and brought a declaratory action. The district court and Court of Appeals found in favor of the employee's estate, holding that Minnesota Statute §60A.081 (2002), prohibits exclusion of passengers or nonpassengers.

The Supreme Court affirmed. The Court analyzed the interplay between the workers' compensation benefits and the insurance exclusion. Typically, workers' compensation provides benefits for work-related injuries in exchange for release of liability. This is true in an automobile accident because the Minnesota No-Fault statute expressly states workers' compensation benefits are primary. The aviation insurance statute is conspicuously silent on this point, however. As there is not a conflict between the aviation statute and workers' compensation, the Court held that passengers cannot be excluded.

The Court noted that aviation policies can exclude the insured party, but not third party passengers or nonpassengers. If the insured is a passenger, however, then the exclusion may apply because the liability coverage is not designed to protect the insured from his own injury or death. **U.S. Specialty Ins. Co. v. James Courtney Law Office, P.A.**, C2-01-1813 (Minn. 06/19/03).

■ **INVASION OF PRIVACY; DEFINITION OF "PUBLICITY."** Employees brought a class action suit against their employer, alleging invasion of privacy by public dissemination of private facts, after employer had faxed a list of 204 employee names and Social Security numbers to managers of 16 freight terminals in six states. The district court dismissed the case for failure to establish the "publicity" element of the claim, but the Court of Appeals reversed, holding that the district court must consider the nature of the private facts and the harm to which the plaintiffs are exposed, in addition to the breadth of the disclosure.

Adopting a definition of "publicity" from the Restatement (Second) of Torts, the Supreme Court held that publicity means "the matter is made public, by communicating it to the public-at-large, or to so many persons that the matter must be regarded as substantially certain to become public knowledge." The Court reversed the Court of Appeals and reinstated the dismissal for failure to state a claim because the distribution of private data to management employees in this case was not public or substantially certain to become so. **Bodah v. Lakeville Motor Express, Inc.**, C5-02-276, (Minn. 06/26/03).

■ **WRONGFUL DEATH; PUNITIVE DAMAGES; BURDEN OF PROOF.** Plaintiff sued defendant, who allegedly shot and killed her son. Defendant's criminal trial had resulted in acquittal. In the civil trial, the jury found that the defendant wrongfully and intentionally caused plaintiff's son's death and awarded compensatory damages, but not punitive damages.

On appeal, plaintiff argued that, as a matter of law, wrongfully and intentionally causing the death of another constitutes a "deliberate disregard for the rights or safety of others," requiring the award of punitive damages. The Court of Appeals affirmed, holding that the jury verdict was consistent because the burden of proof for a wrongful death claim is by a preponderance of the evidence, while the burden for punitive damages is by clear and convincing evidence. **Thompson v. Hughart**, C9-02-1608 (Minn. App. 06/24/03).

■ **INSURANCE; NEGLIGENCE MISREPRESENTATION; INSURANCE AGENT.** Plaintiff purchased a disability insurance policy from a Farm Bureau agent. The agent filled out the application with information supplied by plaintiff. The agent allegedly told plaintiff that inclusion of information regarding prior treatment by a chiropractor was unnecessary. Subsequently, Farm Bureau denied plaintiff's claim for a partially disabling back injury, and plaintiff sued Farm Bureau. Farm Bureau brought a motion *in limine*, asking the court to exclude evidence regarding the agent's actions. The court held

that the agent's completion of the application prior to the insured's signing it was not an actionable tort. The court granted Farm Bureau's motion, then granted summary judgment.

The Court of Appeals reversed, holding that the district court misconstrued plaintiff's negligence claim. Instead of committing a mere drafting error, the agent allegedly negligently misrepresented the application disclosure requirements to plaintiff. The court held that the evidence should have been admitted and the claim for negligent misrepresentation heard by the fact finder. **Hebrink v. Farm Bureau Life Ins. Co.**, C9-02-2189 (Minn. App. 07/08/03).

■ **INSURANCE; INTENTIONAL ACT AND CRIMINAL ACT EXCLUSIONS.** A father and his 17-year-old daughter were arguing, when father threw a beer can and struck daughter in the leg. The daughter retaliated and "chucked" a refrigerator magnet at her father, striking him in the eye and permanently blinding him. The father sued his daughter for his injuries. The daughter's insurer brought a declaratory judgment action, claiming the policy's intentional act and criminal act exclusions barred coverage for the father's injuries. The district court granted the insurer's summary judgment motion, ruling that the act was intentional and criminal.

The Court of Appeals reversed the summary judgment, holding that there was no direct evidence that the daughter expected or intended to injure her father. To the contrary, the appellate court granted summary judgment in the daughter's favor because, as a matter of law, no rational fact-finder could conclude that the daughter's acts supported an inference of intent to injure. Such an inference arises as a matter of law when the insured acts in a calculated manner and without remorse or when the insured's conduct is such that the insured knew or should have known that harm was substantially certain to result. The court also held that the criminal act exclusion did not apply because the daughter was never charged with a crime and because the insurer's criminal act exclusion specifically applied only if there was intent to cause harm, and no such intent existed in this case. **Grinnell Mut. Reinsurance Co. v. Ehmke**, C8-02-2247, C6-02-2263 (Minn. App. 07/08/03).

■ **INSURANCE; INTENTIONAL ACT EXCLUSION; MENTAL ILLNESS.** Defendant sexually abused a minor relative. Defendant claimed that he could not control his conduct because of mental illness. The minor sued and was awarded damages. Defendant assigned his rights from a State Farm umbrella insurance policy to the minor's parents. State Farm refused to pay the award, claiming the intentional act exclusion barred recovery under the policy. State Farm asked the Minnesota Supreme Court to answer the certified question of whether, in sex abuse cases involving mental illness, intent is inferred as a matter of law.

The Supreme Court held that in sex abuse cases where there are disputed issues of material fact regarding a mentally ill insured's intent, the determination is for a jury. In the absence of such disputed facts, intent is inferred as a matter of law. **B.M.B. v. State Farm Fire and Cas. Co.**, C3-03-92 (Minn. 07/10/03).

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— LEE BJORN DAL

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